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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GREGORY KIRK BELL,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

GREGORY KIRK BELL-PRO SE
01008-084
P.O. BOX 600
EGLIN A.F.B.
FLORIDA
32542-7606

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ARGUMENT I

Upon review of the Government's Brief In Opposition, Petitioner is compelled to respond to the inaccurate statements of facts and contentions asserted by the Government. One would assume that the Government would address the Petitioner's issues on the merits that were stated in the Petitioner's Brief. However, it is apparent that the Government has engaged in chicanery by cleverly rephrasing the questions that were originally presented for review. By redesigning the Petitioner's Questions, the Government has tried to shroud the constitutional issues. The result is a failure to respond to the "real" issues by attempting to mislead this Court as to what issues were raised. Question One of the Petitioner's Brief stated:

> WHETHER PETITIONER, GREGORY KIRK BELL, WAS DENIED A FAIR TRIAL IN THAT HE WAS FORCED TO PROCEED WITH COUNSEL NOT OF HIS CHOOSING AFTER RETAINED COUNSEL BECAME UNAVAILABLE MID-TRIAL?

Question One presented in the Government's Brief stated:

> WHETHER PETITIONER WAS IMPROPERLY DENIED REPRESENTATION BY COUNSEL OF HIS CHOICE?

The issue is not whether Petitioner was denied counsel of choice, but whether Petitioner was denied the "due process" of a fair trial because the trial court permitted Petitioner's 'chosen' counsel to abandon him at mid-trial, thereby forcing Petitioner to continue the trial with unchosen counsel.[1]

Furthermore, the Government alludes to an issue that was <u>never</u> raised by the Petitioner: Abuse of Discretion. In the first paragraph at the beginning of the Government's Argument, they have erroneously stated :

> 1. Petitioner contends (Pet. 11-31) that the trial court erred by requiring his case to proceed in the absence of his chosen counsel. More specifically, he maintains that the trial judge abused his discretion by failing to grant petitioner a severance or a continuance until Vaughn was again available to represent him. [Gov. p. 6].

It is interesting to note that Petitioner never raised this discretionary issue in his

---

1/ Unchosen counsel [Joseph Sharit] was an associate in chosen counsel's [Lane Vaughn] law firm. Sharit was never retained by Petitioner under any circumstances to represent him. Sharit's role was to conduct legal research during the trial for chosen counsel. Sharit did not participate in any pre-trial preparation and was absent from the court-room during the testimony of several government witnesses, one of which was the key and chief witness against Petitioner. Petitioner vehemently objected to Sharit's representation. [See A-18 to A-28].

Petition For Certiorari. This "new" issue is one that has been fabricated by the Government. The Petitioner's issues are constitutional violations of the Fifth and Sixth Amendment and not that of whether the trial judge abused his discretion.

Abuse of discretion is not the appropriate standard to be employed in determination of claims of deprivation of constitutional rights. Constitutional errors and questions of law are reviewed under the non-deferential de novo standard. This Court has stated:

> While this Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental--i.e., constitutional criteria established by this Court have been respected. Beck v. Ohio, 379 U.S. 89, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964).

The trial judge has a responsibility to protect the constitutional rights of the accused. Only subsequent to a defendant receiving these constitutional protections to which he is entitled can the issue of the trial court's discretion be raised. The trial court's discretion is not "triggered" until the defendant is afforded "due process".

The Government has also misrepresented the Appellate Court's opinion on page 5 of their Brief:

> ...and because the court of appeals concluded that petitioner suffered no prejudice as the result of the substitution of Sharit for Vaughn at the conclusion of the government's case, the court of appeals held that the trial court's decision to proceed despite Vaughn's absence was not an abuse of discretion. [Pet. App. A10-A11].

Upon a scrutinizing review of the Appellate Court's Opinion [App. A1-A15], Petitioner is unable to locate the Government's enhanced version relating to discretionary abuse. The Government has again injected an issue to further substantiate their argument and "cloud" the real issues.

In response to the Government's Argument 1.a, [page 7-12], Petitioner would suggest a further examination of this Court's most recent decision in Wheat v. United States, No. 87-4 (5/23/88) is necessitated. Although this case involves the same Sixth Amendment right to counsel of choice, the circumstances are quite dissimilar to the case at bar. Chief Justice Rehnquist characterized the issue as whether the District Court erred in declining petitioner's waiver of his right to conflict free counsel by refusing to permit petitioner's proposed substitution of attorneys. The question

> stem largely from an appreciation that a primary purpose of the Sixth Amendment is to grant a criminal defendant effective control over the conduct of his defense.....An obviously critical aspect of making a defense is choosing a person to serve as an assistant and representative. [43 CrL 3040].

This is specifically what Petitioner complains he was deprived of: Petitioner was unable to present his defense with the attorney he selected due to the fact that the trial court acquiesced to lead counsel's abandonment of Petitioner at mid-trial thus forcing the Petitioner to continue the trial with unwanted, unprepared, inexperienced, and subsequently ineffective counsel.

> THE COURT: Now, let me say for the record, to, here to Mr. Vaughn, at this time, I am just extremely sorry what has happened in his case and I am willing to excuse him and any time that he wants to leave he is free to leave, but the trial will go on, you know, with his associate counsel. Alright.
>
> MR. VAUGHN: Your Honor, the problem with that is that my associate counsel has never even been here for all of the testimony. He is not even admitted to practice in front of this court. He wasn't here for all of Muzevsky [Gov. chief witness against this Petitioner], he wasn't---
>
> THE COURT: Well, I've seen him in and out, I mean, here all of the time so it--you are free to leave if you want to and let associate counsel handle the case or you are free to remain.
>
> [TR. VOL. VI, p. 243]

In claiming ineffective assistance of counsel because of the trial court's denial of a motion

for a severance or continuance based upon the unavailability of retained counsel, the Petitioner need not establish actual prejudice in order to be entitled to relief. The denial of effective assistance of counsel alleged herein is not based upon a conflict of interest or upon an allegation that counsel was actually ineffective. Rather, the claim is based upon an "actual or constructive denial of assistance of counsel altogether", in which prejudice is so likely that it is assumed as a matter of law without inquiry into the facts of the individual case. United States v. Cronic, 466 U.S. 648 (1984); Strickland v. Washington, 466 U.S. 668 (1984). The substitute counsel's ineffectiveness at trial was irrelevant to the impact of the denial of the right to chosen counsel.

The right to choice of counsel is distinct from the right to adequate assistance of counsel. Denial of this qualified right is reversible error regardless of whether prejudice is shown.

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's

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playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed,who plays the role necessary to ensure that the trial is fair..... Counsel...has a duty to bring to bear such skill and knowledge as will renderthe trial a reliable adversarial testing process. Strickland v. Washington, 466 U.S. 668,685 (1984).

For the similar reasons why this Court granted certiorari in Wheat v. United States, (because the Courts of Appeals have expressed substantial disagreement about when a district court may override a defendant's waiver of his attorney's conflict of interest), the Petitioner respectfully requests that this Court grant certiorari in his cause. There is a conflict among the lower courts as to whether a trial should continue in the absence of a defendant's 'chosen' counsel. Petitioner has provided an ample number of cases in his Brief that substantiate the unharmonious decisions reflected in the lower courts. Some courts customarily grant continuances, yet others require the defendant to proceed no matter what circumstances have occurred.

This case is of national significance as it could affect thousands of criminal litigants. A

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ruling in the case at bar would enable this Court to establish precedent in this 'gray' area of a defendant's Sixth Amendment right to counsel of choice and possibly clarify the Court's position on that choice to effective assistance of counsel. Not only should a defendant receive a fair trial, but only by choosing his counsel will he be guaranteed effective counsel who is prepared to assume an adversarial role in the zealous spirit of defense theory. One of the most serious flaws in the criminal justice system today is that many defendants are provided with ineffective counsel. If a defendant selects an attorney of choice, he has done so for evident reasons. To force that defendant to continue a trial when that 'chosen' attorney becomes unavailable is to deprive such defendant of the most fundamental of constitutional rights. The Court is lacking a 'clear' vision in this area and needs to distinguish the difference between the discretion deferred to a trial court as compared to the denial of counsel of choice.

Another case that exemplifies Petitioner's argument [discovered subsequent to the filing

of Petitioner's Brief, 2/29/88] that was heard in the Third Circuit was United States v. Accetturo (Appeal of Boylan) No. 88-5155, CA 3, 3/9/88, 43 CrL 2013. The appellate court rejected a lawyer's objections to being appointed as substitute counsel for a criminal defendant four months into a complex trial. The appointment was triggered by the sudden unavailability of lead counsel due to terminal illness. Due to the fact that the attorney was granted 24 days to prepare for the case, had been serving as local counsel, had done significant pretrial work for the defendant, and the defendant never expressed any objection to the lawyer's qualifications, the Third Circuit upheld the courts authority to appoint counsel after the start of trial.

This case is distinguishable from the case at bar for the following reasons:

(1) Substitute counsel was granted a 24 day continuance to prepare the case. Sharit was denied a continuance.

(2) Was familiar with the case as he had participated in pretrial motions the previous 14 months. Sharit did not participate in any pre-trial preparation.

(3) Had filed a previous notice of appearance as local counsel. Sharit never filed a notice of appearance in behalf of Petitioner before the court.

(4) Substitute counsel was accepted by the defendant to continue representing his interests. Petitioner objected to Sharit representing him in the absence of his chosen counsel.

The Third Circuit also noted that:

> The focus of the inquiry is whether the court's undoubted power to appoint counsel for a criminal defendant in need of such counsel is negated because the trial in which counsel is required has been underway for some time. No reported opinion on this issue has been called to our attention. [43 CrL 2013]

The Government argues that trial courts must be accorded wide discretion in ruling on continuances even though constitutional rights might be violated. The Government contends that the interpretations of law derived from the following authorities can be applied to the case at bar: United States v. Mitchell, 777 F.2d 248,256 (5th Cir. 1985); Sampley v. Attorney General, 786 F.2d 610,613 (4th Cir.) cert denied, 478 U.S. 1008 (1986); Morris v. Slappy, 461 U.S. 11,12 (1983); Ungar v. Sarafite, 376 U.S. 575,589 (1964); and Giacalone v. Lucas, 445 F.2d 1238,40-43 (6th Cir. 1971) cert. denied, 405 U.S. 922 (1972). However, these cases were distinguished by specific facts;facts that did not occur in the case at bar.

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In United States v. Mitchell, supra, Mitchell attempted to manipulate the court's schedule by retaining an attorney whom he knew to have a conflict with the trial date. Since Mitchell had a one-month opportunity to retain other counsel before the trial date, his request for a continuance was judged to be in bad faith for the purpose of a delay.

In Sampley v. Attorney General, supra, the defendant, after numerous continuances, failed to hire an attorney, when in fact he had been given a month to secure counsel. A continuance was denied the day of trial. Since Sampley had been given a fair opportunity to secure counsel of his own choice and availed not to, a continuance was properly denied.

In Morris v. Slappy, supra, six days before a scheduled trial, a substitute public defender was assigned to represent a defendant after the original public defender became ill. At the opening of the trial, the defendant made a motion for a continuance, claiming that the attorney did not have enough time to prepare the case. The trial court denied the motion. Because the newly assigned substitute counsel acknowledged to the trial court that he was fully prepared and that a further continuance would

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not benefit him in presenting the case, the Supreme Court held that the defendant was not denied a fair trial as a result of his requested attorney's unavailability.

In the case at bar, Sharit and Petitioner immediately objected to proceeding to trial without retained counsel Vaughn being present. At no time did Sharit or Petitioner indicate that they were prepared to continue the trial. In fact, Vaughn had earlier advised the court that Sharit was not present for the testimony of the chief government's witness against the Petitioner and was also not admitted to practice before the court.

In Ungar v. Sarafite, supra, after two continuances were granted to allow a second lawyer to appear for the defendant, another continuance for one week was requested in order to allow that lawyer to familiarize himself with the case. The request was denied. Since Ungar had been afforded sufficien time to hire counsel who could be available, the issues were limited and clear cut (criminal contempt and the fact that Ungar himself was a lawyer familia with the court's practice of not granting adjournments, this Supreme Court held that Ungar was not denied a fair hearing.

In Giacalone v. Lucas, supra, a defendant's attorney was unavailable for trial due to his hospitalization, but the attorney's partner and an associate were available, were prepared, and proceeded to competently try the case. A request for a continuance was denied.

Unlike the case at bar, both of Giacalone's associate lawyers shared the responsibilities of examination of witnesses and arguing to the jury. All three lawyers were familiar with the case. Also, two continuances had previously been granted and the defendant's request for a third continuance was virtually open ended, as the delay could have been as much as one-third of a year before defendant's lead counsel would be well enough to resume his role in the trial. Giacalone is distinguishable in that the availability of alternative counsel of a like caliber was present.

Upon examination of the qualifications of Vaughn as compared to Sharit [A-20, A27-A28], it is evident that Sharit is lacking experience in the field of criminal defense practice. Not only was Sharit absent during crucial testimony of a chief witness, but Sharit never shared in any

of the responsibilities of cross examining the Government's witnesses.

The Government alleges that Vaughn had earlier obtained a continuance by claiming medical problems that subsequently proved unsubstantiated, and therefore was engaging in dilatory tactics. At the very least, these contentions are specious. The record will reflect the open animosity between Vaughn and the trial court during the course of the proceedings. The court's comments were delivered after Vaughn had departed. Vaughn was never able to refute the misrepresentations referred to by the court. Therefore, sworn affidavits were procured to aver Petitioner and Vaughn's contentions. [See A22-A24].

Secondly, concerning the duration of a continuance, the trial court never inquired how long Vaughn might need to accommodate his personal needs. The trial court was more concerned with concluding the trial than insuring Petitioner's constitutional right to chosen counsel's presence.

Thirdly, the Government argues that since Sharit had earlier participated in the defense, he therefore could reasonably be expected to be conversant with the case. However, the <u>only</u>

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representation that Sharit made in behalf of the Petitioner was when he proffered the facts in arguing a motion to strike Rule 404(b) evidence. Vaughn had delegated to Sharit the task of researching the case law on exclusionary evidence during the course of the trial. This motion was argued orally and not in the presence of the jury. After Sharit had proffered a part of the argument, the trial court prevented Vaughn from further expressing his assertions of the facts. Sharit was ordered by the trial court to soley continue the argument without the assistance of Vaughn. [TR. VOL. III, pages 236-245]. The Motion To Strike Rule 404(b) Evidence and the supporting Memorandum was filed in open court and exclusively submitted by Vaughn.

Lastly, the Government argues that:

> ...because petitioner had not subpoenaed any witnesses to testify on his own behalf, it did not appear that Sharit would be required to present a defense case. After fully reviewing the record, both courts below found that Sharit ably represented petitioner in fulfilling these responsibilities. [Gov. p. 9].

This argument rests on speculation of the most dubious kind. How is it possible that Sharit could have effectively represented the Petitioner when in fact he was not present during the testimony of Government witnesses who testified against the Petitioner???

How could Sharit have effectively presented a defense when he was not cognizant of all the facts presented by the Government???

The assumption that Petitioner is not going to present a defense because he has not 'subpoenaed any witnesses' borders on the realm of absurdity. The precise issue is that Petitioner was prevented from airing, (much less establishing), his defense when Vaughn departed from the trial. The Government has failed to recognize the level of importance that Vaughn attained during the trial

1) Only Vaughn had cross-examined the witnesses and was therefore cognizant of their testimony.

2) Only Vaughn was familiar with the case and aware of the existence of inculpatory and exculpatory evidence.

3) Only Vaughn was adequately skilled and knowledgeable in the theory of defense, defense strategy, and the oratory skills for delivering an effective closing argument.

4) Only Vaughn was familiar with the specific defense exhibits that were selectively introduced by Vaughn during the Government's case in order to establish the groundwork for Petitioner's defense.

5) Only Vaughn was familiar with the complex association between the Government witnesses and these defense exhibits.

Sharit was not cognizant of the aforementioned facts nor did he possess the expertise and attributes of Vaughn.

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Vaughn would have made a difference in the outcome of the trial. More specifically, Vaughn would have presented documentary evidence; witnesses who were waiting to testify to his relevant defense theories; applying such defense theories in the oral summation; and requesting the addition or modification of jury instructions. Had these four factors been included in the defense of the instant case, the jury result would have been different.

The Government additionally argues that the cases cited by the Petitioner are not analogous to the case at bar. The Government is entitled to their interpretations of the law as derived from these cases, but only upon this Court's closer scrutiny of the facts in each case will the relevant similarities be revealed.

In Gandy v. Alabama, 569 F.2d 1318, (5th Cir. 1978), the issue is not that of whether the motion for a continuance was made before the trial started, but the failure of the trial court to assure retained counsel's presence at the trial is what constituted a denial of due process under the Sixth Amendment.

In Linton v. Perini, 656 F.2d 207 (6th Cir.

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1981), cert. denied,454 U.S. 1162 (1982), the Sixth Circuit held that a defendant was unconstitutionally denied the right to select counsel of his own choice after defendant was forced to go to trial with an attorney appointed by the court. The trial court had refused to grant a continuance to retained attorney who could not prepare for the trial in the ten days allowed by the court. Like the case at bar, Linton involved serious felony counts and the basic issue was the credibility of the witnesses, of which appointed counsel was not able to adequately investigate and prepare a plan of defense.

In Releford v. United States, 288 F.2d 298 (9th Cir. 1961), the constitutional violation occurred when the trial judge ordered another attorney to represent the defendant over the defendant's objections and in the face of the second attorney's reluctance after the retained attorney became hospitalized.

Two cases that closely resemble the facts of the instant case are United States v. Mardian, 546 F.2d 973 (D.C. Cir. 1976) and United States v. Tramunti, 513 F.2d 1087 (2nd Cir.), cert. denied, 423 U.S. 832 (1975). These cases were previously

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examined in the Petitioner's brief [Pet. 22, 27], and so strongly support the Petitioner's contentions that further discussion of such cases is not warranted to rebut the Government's assertions.

Petitioner has conclusively demonstrated that his right to choose the counsel to present his defense was unconstitutionally abridged by the trial court. Therefore, this Court should grant a writ of certiorari to correct the injustice inflicted upon Petitioner.

ARGUMENT II

Petitioner is of the opinion that the arguement as set forth in the Petitioner's Brief is of substantive merit and does not need to be repeated for the sake of redundancy. However, to ascertain that this Court is cognizant of the "real" facts, Petitioner would direct the Court's attention to the Government's Brief, page 4-5. The Government has incorrectly stated that the "marijuana packages were similar to those introduced during the trial in New Orleans." The issue that Petitioner complains of is that the boxes introduced into evidence in trial in Roanoke were the exact identical boxes submitted before the jury in New Orleans.

IN THE

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1988 TERM

GREGORY KIRK BELL,

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V.

UNITED STATES OF AMERICA,

RESPONDENT

PROOF OF SERVICE

I, GREGORY KIRK BELL, PRO SE, after being duly sworn, hereby certify that a true copy of the foregoing REPLY BRIEF FOR THE PETITIONER was deposited in the United States mail, first class postage prepaid, this 21 day of June, 1988, addressed to the following counsel for the Respondent, pursuant to the Rules of the Supreme Court, Rule 28.5(c).

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GREGORY KIRK BELL--PRO SE

STATE OF FLORIDA
COUNTY OF OKALOOSA

Sworn to and subscribed before me this

15 day of June, 1988.

NOTARY PUBLIC

MY COMMISSION EXPIRES:

Notary Public, State of Florida
My Commission Expires Aug. 16, 1988
Bonded Thru Troy Fain - Insurance, Inc.